BakerHostetler

February 1, 2019

By CM/ECF

The Honorable J. Paul Oetken United States District Court Judge Thurgood Marshall United States Courthouse 40 Foley Square New York, NY 10007

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Re: VR Optics, LLC v. Peloton Interactive, Inc. v. Villency Design Grp., et al., No. 1:16-cv-6392 (JPO) (S.D.N.Y.) — Letter Motion to Compel Production of Documents

Honorable Judge Oetken:

Pursuant to Paragraph 4(B) of Judge Oetken's Individual Practices in Civil Cases, Plaintiff VR Optics, LLC and Third-Party Defendants Villency Design Group, LLC, Eric Villency, and Joseph Coffey (collectively "VRO/VDG") submit this letter motion to compel the production of certain documents withheld as privileged by Defendant Peloton Interactive, Inc. ("Peloton"). Specifically, Peloton waived privilege by disclosing opinions of counsel relating to the patent-insuit to numerous third parties.

On November 21, 2018, Peloton served its privilege log in this case (attached as *Exhibit A*), which included assertions of privilege for certain communications between Peloton and its intellectual property counsel that appear to relate to the asserted patent in this case – U.S. Patent No. 6,902,513 (the "McClure patent"). *See, e.g., Ex. A* at 3 (PRIV040-044). On December 18, 2018, Peloton clawed back as privileged three documents it had produced in discovery, at least one of which was

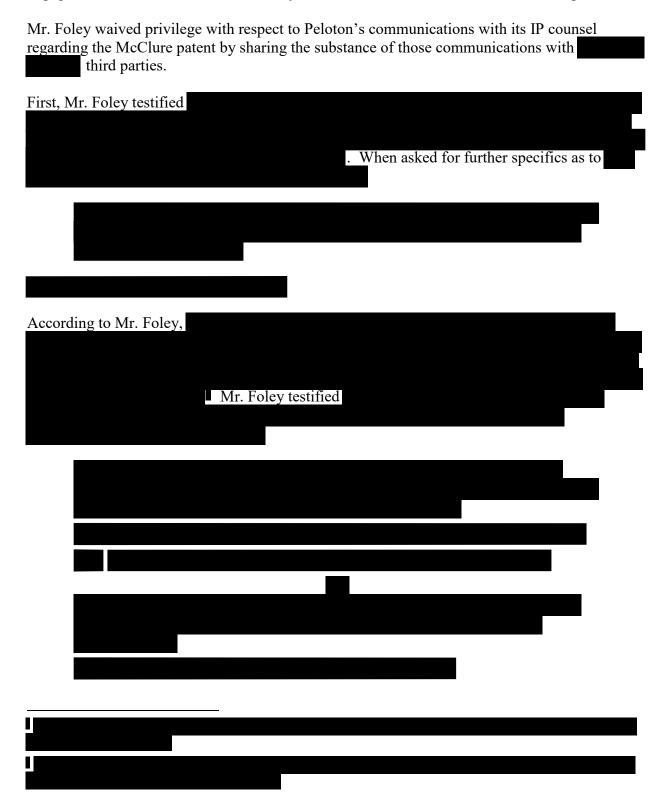
December 18, 2018 Claw Back Letter (attached as *Exhibit B*).

VRO/VDG is not claiming here that Peloton's apparently inadvertent production of these documents constituted a waiver. Rather, VRO/VDG recently discovered in its deposition of Peloton's CEO, John Foley, that Mr. Foley

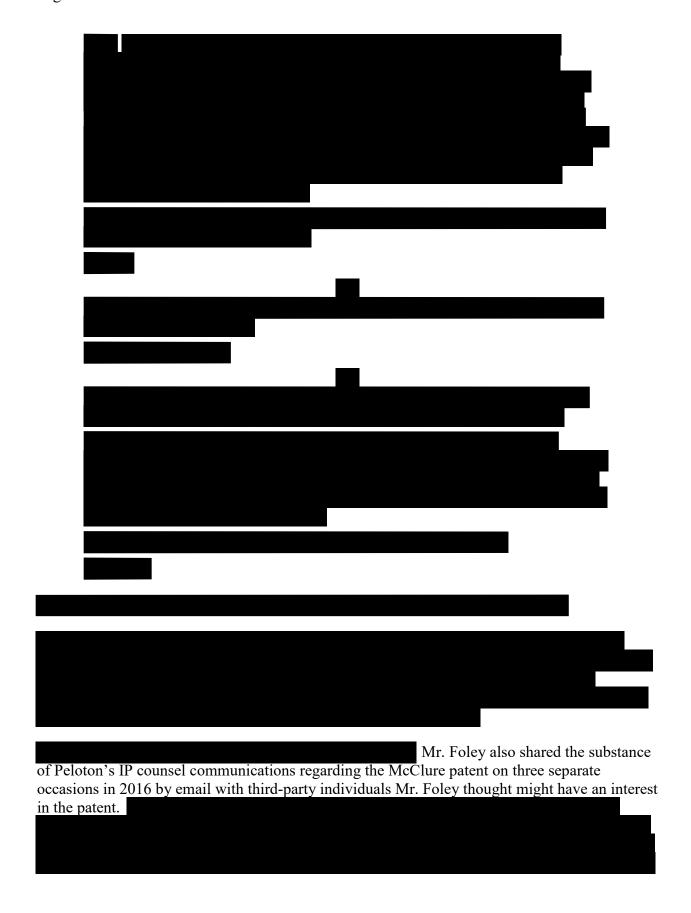
Accordingly, VRO/VDG respectfully requests that the Court compel the production of all documents reflecting communications with Peloton's IP counsel regarding the McClure patent—those identified in Peloton's privilege log, the documents clawed back by Peloton, as well as all

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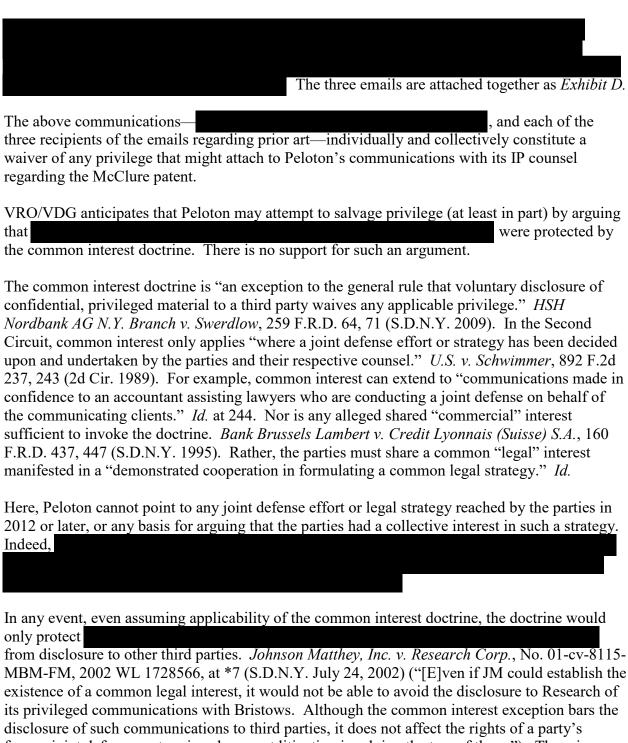
other documents reflecting such communications including all email correspondence to and from Peloton's IP counsel and internal to Peloton that relate to the McClure patent. The parties engaged in a meet and confer on February 1, 2019, but were unsuccessful in resolving this issue.



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existence of a common legal interest, it would not be able to avoid the disclosure to Research of its privileged communications with Bristows. Although the common interest exception bars the disclosure of such communications to third parties, it does not affect the rights of a party's former joint defense partner in subsequent litigation involving the two of them."). There is no basis for Peloton to now withhold documents and information from VDG/VRO that Peloton alleges it shared freely with the parties prior to litigation. *See In re Chevron Corp.*, 650 F.3d 276, 290 n.19 (3d Cir. 2011) ("[T]he community-of-interest doctrine . . . protects the confidentiality of privileged communications shared by parties with common legal interests *against a common adversary*." (emphasis added)).

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Finally, setting aside privileged by disclosing the substance of Peloton's IP counsel opinions to and again in the prior art emails to third-parties in 2016. Each of these disclosures provides an independent basis for waiver.

Because Peloton waived attorney-client privilege with respect to its IP counsel's opinions regarding the McClure patent, VRO/VDG respectfully requests that the Court compel the production of all documents reflecting communications regarding the McClure patent—those identified in Peloton's privilege log, the documents clawed back by Peloton, as well as all other documents reflecting such communications including all email correspondence to and from Peloton's IP counsel and internal to Peloton that relate to the McClure patent and all opinions relating to infringement and/or validity.

Sincerely,

/s/ Michael D. Gannon

Michael D. Gannon Counsel for VR Optics, LLC